CHILDREN AND THE LAW

edited by

Bernard Green

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CHAPTER ONE: INTRODUCTION

CHAPTER TWO: CHILD WELFARE LEGISLATION

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A. General

Introduction

In ordinary usage, "children" can refer to two different groups: one group characterized by age, the other by a legal relationship between the child and another person, his or her parent.

Our society has determined that a person does not have complete legal rights until he or she has reached a certain age. In this province, by the Age of Majority and Accountability Act, R.S.O. 1980, c. 7, a person is vested with full legal capacity at age 18. The eighteen-year-old can vote, marry without parental consent, enter into contracts, etc. But he or she cannot obtain a drink legally in any bar in Ontario until the following year.

Fixing the age for majority at 18 does not answer many questions: (1) At what age shall we allow young people to drive? To leave school? At what age should a person be fully responsible before the criminal law? (2) Does whatever answer you or society gives answer the question, at what age a person should be allowed to obtain an abortion?

Your answer to the last question may be affected by the second meaning that "children" has, i.e., a legal relationship between the "child" and another person, his or her parent. In our society, the legal relationship is normally a product of biology: a parent-child relationship is created as a result of a man and a woman entering into a relationship which produced a child. The usual non-biological method of creating the parent-child relationship is by adoption. See Part IV of the Child Welfare Act, R.S.O. 1980, c. 66.

The issues we explore in this seminar involve basic problems of political philosophy. More particularly, we are concerned with the allocation of power between the state, the parents and the child. The historical background is provided in the article by Marks, "Detours on the Road to Maturity," (reproduced below); the basic issues are posed in the article by Mnookin and Coons, "Toward a Theory of Children's Rights," (reproduced below). We focus on one specific problem, that of minor's consent to medical procedures.

The response of the legal system to issues involving children may be affected by the introduction into Canadian law of the Charter of Rights and Freedoms, reproduced below.

CHAPTER TWO: CHILD WELFARE LEGISLATION

A. Introduction

Every jurisdiction in North America has legislation that authorizes the state to intervene in the life of the family by removing the child from his or her home if certain conditions are satisfied. Ontario is no exception. The Child Welfare Act, although revised very recently, betrays its nineteenth century origins; see, for example, s. 19(1).

Among the questions you should consider are the following: (1) In what circumstances is the state justified in removing the child from his home? (2) Should this decision be based on a cost-benefit analysis - i.e., if the costs (to whom?) outweigh the benefits (to whom?), should the state refuse to intervene? (3) Is it possible to determine the costs and benefits? (See Mnookin, "Child-Custody Adjudication," reproduced herein.) (4) Is the state concerned about the present situation, or is it really concerned about the future consequences of the present situation? (5) If the latter, do we have an accurate means of predicting future human behaviour? (See Dershowitz, "On Preventive Detention," reproduced herein.)

(b) Mediation

One of the more fashionable methods of conflict resolution at the present time is mediation. The technique is based on having two adverse parties reaching - or attempt to reach - an agreement resolving their differences with the assistance of a skilled disinterested third party. Mediation has been historically used in labor relation and international disputes; Mediation is now part of the law of Ontario in child custody adjudication: Children's Law Reform Act, s.31. It is being proposed to help resolve property disputes between husbands and wives in the Family Act, 1985, s.3 (Bill 1, 1985)

C.L.R.A. 31

Mediation

31.—(1) Upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate any matter specified in the order.

Consent to act

(2) The court shall not appoint a person under subsection (1) unless the person,

(*a*) has consented to act as mediator; and

(*b*) has agreed to file a report with the court within the period of time specified by the court.

Duty of mediator

(3) It is the duty of a mediator to confer with the parties and endeavour to obtain an agreement in respect of the matter.

Form of report

(4) Before entering into mediation on the matter, the parties shall decide whether,

(*a*) the mediator is to file a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation; or

(*b*) the mediator is to file a report that either sets out the agreement reached by the parties or states only that the parties did not reach agreement on the matter.

Admissions made in the course of mediation

(7) When the parties have decided that the mediator's report is to be in the form described in clause (4) (*b*), evidence of anything said or of any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of all parties to the proceeding in which the order was made under subsection (1).

Fees and expenses

(8) The court shall require the parties to pay the fees and expenses of the mediator.

Idem, proportions or amounts

(9) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

Idem, serious financial hardship

(10) The court may relieve a party from responsibility for payment of any of the fees and expenses of the mediator where the court is satisfied that payment would cause serious financial hardship to the party.

CHAPTER THREE: JUVENILE DELINQUENCY

A. Introduction

Every (Western) society has had to decide how it will handle persons who are not adults when they have engaged in criminal activity. The responses have taken two basic forms: (1) The North American: on this continent, we have established specialized courts with a special process and special dispositional powers to deal with part of this group. (See the Young Offenders Act, reproduced below. In conjunction with the Young Offenders Act, we have reproduced its predecessor, the Juvenile Delinquents Act. We have done so because the Young Offenders Act has not yet been proclaimed; the cases we reproduce were decided under the Juvenile Delinquents Act.) Those who are above the maximum age for juvenile court jurisdiction are subject to the ordinary process, i.e., trial in adult criminal court.

(2) In some European countries, young people who would be processed in juvenile court in Canada are handled by the ordinary child welfare system. Note that in these countries, too, there is a gap. Thus, in Sweden, the age of criminal responsibility is 15 and anyone 15 years of age or older can be tried in the ordinary criminal courts. See "Measures to Combat Juvenile Delinquency in Sweden," paragraphs 21-24, reproduced below.